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In the Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., ETC., ET AL., PETITIONERS

v.

JOSEPH SCHEIDLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 18 U.S.C. 1962(c) and (d) require proof of economic motivation either in the racketeering enterprise or in the racketeering acts.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are a national non-profit organization that supports the legal availability of abortion, and two health centers that perform abortions. Respondents are several individuals and organizations that oppose abortion, and a medical laboratory that formerly provided services to the two petitioner health centers. Pet. App. A2-A5, B2-B3.

In October 1986, petitioners sued respondents in the United States District Court for the Northern District of Illinois, alleging violations of the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (c), and (d), as well as several pendent state-law claims. Petitioners sought injunctive relief, as well as treble damages, costs, and attorneys' fees. Following discovery, the complaint was amended twice in 1989. In March 1991, petitioners filed a "RICO Case Statement" that further detailed their allegations.[1]

As amended, the complaint alleged that respondents were members of a nationwide conspiracy to shut down abortion clinics through a pattern of extortion. Petitioners alleged that respondents (other than respondent Vital-Med Laboratories, Inc.)[2] and their co-conspirators used force and threatened the use of force to induce doctors and clinic employees to give

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[1] Pursuant to local rules, some district courts require RICO plaintiffs to submit a "RICO Case Statement" detailing, among other things, the enterprise, the pattern, the victims, and the participants involved. Contrary to respondents' claim, see Terry Br. in Opp. 2-3 & n.3, RICO Case Statements are merely extensions of the pleadings and thus may properly be (and routinely are) considered by courts in deciding motions under Fed. R. Civ. P. 12(b)(6). See *McLaughlin* v. *Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *Guidry* v. *Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Glessner* v. *Kenny*, 952 F.2d 702, 712 n.9 (3d Cir. 1991); *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991).

[2] As to respondent Vital-Med, petitioners alleged that it participated in the conspiracy by aiding numerous thefts of fetal remains from one of Vital-Med's laboratories during 1988. See Pet. App. A4-A5.

up their economic rights to employment, and to induce patients to give up their rights to medical services. Specifically, the complaint charged that respondents physically and verbally intimidated clinic personnel and patients; invaded clinics and damaged their equipment; blocked clinic entrances and exits; coordinated telephone campaigns to tie up clinic telephones; set up appointments under false pretenses to prevent legitimate patients from making appointments; established competing pregnancy testing and counseling facilities near the clinics; and interfered with the clinics' business relationships with landlords, patients, personnel, and medical laboratories. The RICO Case Statement further alleged that respondents and their co-conspirators engaged in bombings and numerous acts of arson and attempted arson to carry out the extortion scheme. With respect to their substantive and conspiracy claims based on 18 U.S.C. 1962(c), petitioners alleged that the racketeering "enterprise" was respondent Pro-Life Action Network (PLAN), a coalition of anti-abortion groups. Pet. App. A2-A3 & n.5.

2. The district court dismissed the case pursuant to Rule 12(b)(6), Fed. R. Civ. P. The court first concluded that the Sherman Act does not apply when the activities complained of are essentially "political," and the parties are not "commercial competitors." Pet. App. B3-B8. The court next rejected petitioners' claim under 18 U.S.C. 1962(a), which generally proscribes investing racketeering income to acquire or maintain an interest in an enterprise, because the "income" alleged by petitioners consisted of voluntary donations from persons opposed to abortion, which "in no way were derived from the pattern of racketeering alleged in the complaint." Pet. App. B9.

The court then concluded that petitioners failed to state a claim under 18 U.S.C. 1962(c), which makes it unlawful to conduct the affairs of an enterprise through a pattern of racketeering activity. Relying on the Second Circuit's opinion in *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983), and its progeny, the court held that RICO embodies "an economic motive requirement * * * to the extent that some profit-generating purpose must be alleged in order to state a RICO claim [under Section 1962(c)]." Pet. App. B13. Because "the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business," and the predicate acts were not "crimes in which the necessary goal was to obtain money," *id.* at B15, the court concluded that petitioners failed "to allege the economic motivation requirement of RICO." *Id.* at B16. In light of its dismissal of petitioners' claims under 18 U.S.C. 1962(a) and (c), the court also dismissed the claim that respondents conspired to violate those sections, in violation of 18 U.S.C. 1962(d). Pet. App. B16. Finally, the court declined jurisdiction over the pendent state-law claims because of its dismissal of all the federal claims. Pet. App. B16-B17.

2. The court of appeals affirmed. Pet. App. A1-A35. The court first held that the antitrust claim was properly dismissed, noting that respondents are not involved in business and have no ability to concentrate economic power. *Id.* at A15-A16. The court also agreed with the district court's conclusion that the voluntary contributions received by respondents from their supporters are not income "derived, directly or indirectly, from a pattern of racketeering activity," and accordingly that those contributions

cannot support petitioners' claim under 18 U.S.C. 1962(a). Pet. App. A20-A24.

The court of appeals next turned to petitioners' claim that respondents conducted the affairs of PLAN through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Pet. App. A24-A34. The court agreed (Pet. App. A32-A33) with the Third Circuit's conclusion in *Northeast Women's Center, Inc.* v. *McMonagle*, 868 F.2d 1342 (3d Cir.), cert. denied, 493 U.S. 901 (1989), that conduct of the type alleged by petitioners constitutes extortion under the Hobbs Act, 18 U.S.C. 1951—a predicate crime under RICO. The court disagreed, however, with *McMonagle*'s conclusion that a pattern of such conduct is actionable under RICO. Pet. App. A32-A33. Like the district court, the court of appeals elected to follow instead the Second Circuit's decision in *Ivic*, which held that an "economic motive" requirement is implicit in the "enterprise" element of the offense. The court therefore concluded that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO." *Id.* at A32. Because it was "clear that the aim of the extortion[s] [was] to close women's health centers" rather than to raise funds, and because the economic effect of respondent's conduct did not establish the "economic motive required by *Ivic* and its progeny," the court concluded that petitioners failed to state a claim under 18 U.S.C. 1962(c). Pet. App. A33-A34. In light of its conclusions concerning petitioners' substantive RICO claims, the court also affirmed the dismissal of the conspiracy claim under 18 U.S.C. 1962(d). Pet. App. A34.

DISCUSSION

Petitioners challenge the court of appeals' conclusion that they failed to state a claim under Sections 1962(c) and (d).[3] In our view, the court of appeals erred in concluding that RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. Because the courts of appeals have disagreed on whether RICO imposes such a requirement, the Court should grant certiorari to resolve the conflict.

1. a. In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). That principle governs this case. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise * * * to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity." Nothing in that broad proscription suggests a congressional design to reach only conduct involving economic motivations, goals, or purposes.

Thus, the phrase "racketeering activity" means conduct that is "chargeable" or "indictable" under a wide range of state and federal laws, including non-economic crimes such as murder, arson, and obstruction of justice, 18 U.S.C. 1961(1). The "enterprise"

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[3] Petitioners do not appear to challenge in this Court the dismissal of their claim under Section 1962(a) or the dismissal of their Section 1962(d) claim to the extent the latter claim alleged a conspiracy to violate Section 1962(a).

element, in which the court of appeals purported to find an "economic motive" limitation, is no less broad. Section 1961(4) provides that " 'enterprise' includes *any* individual, partnership, corporation, association, or other legal entity, and *any* union or *group of individuals associated in fact* although not a legal entity" (emphasis added). By using the inclusive word "any," the statute clearly manifests an intent to embrace the totality of "individual[s]" and "group[s] of individuals associated in fact." That intent is confirmed by the use of the word "includes"—as distinct from the word "means" used in other RICO definitions, see, *e.g.*, 18 U.S.C. 1961(6)—which denotes a broad illustrative list, not an exhaustive one. Cf. *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 & n.1 (1934). Because it is difficult to imagine a statutory definition less susceptible to a narrow and grudging interpretation, this Court in *United States* v. *Turkette*, *supra*, rejected the claim that it should be confined to "legitimate" organizations, noting that "[t]here is no restriction upon the associations embraced by the definition." 452 U.S. at 480.[4]

b. In narrowing the scope of the statutory language, the court of appeals relied principally on the reasoning of *Ivic*. In that case, the Second Circuit

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[4] This is not to suggest that economic factors are utterly irrelevant to RICO. All of the RICO prohibitions require that the enterprise be engaged in or that its activities affect interstate or foreign commerce. See 18 U.S.C. 1962(a), (b), and (c). In addition, RICO requires that a civil plaintiff show that he has been "injured in his business or property" by the conduct constituting the RICO violation. 18 U.S.C. 1964(c). Respondents do not suggest that petitioners cannot meet those modest requirements.

reversed the Section 1962(c) convictions of Croatian nationalists who had plotted to "use terror, assassination, bombings, and violence," *United States* v. *Ivic*, 700 F.2d at 58, to further the political cause of Croatian independence. The Second Circuit noted that the term "enterprise" is used in Sections 1962(a) and (b), which prohibit (1) using racketeering income to acquire an interest in an enterprise, or to establish or operate an enterprise, and (2) maintaining an interest in or control of an enterprise. As used in those sections, the Second Circuit explained, the term "quite clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money." *United States* v. *Ivic*, 700 F.2d at 60-61. The *Ivic* court therefore concluded that a parallel limitation must be read into Section 1962(c). See also *United States* v. *Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (following *Ivic*), cert. denied, 488 U.S. 974 (1988).

We believe the Second Circuit's statutory analysis misses the mark for several reasons. First, because the term "enterprise" is defined by RICO, the *Ivic* court erred in seeking its meaning from the various contexts in which the term is used in the statute, rather than simply applying the broad definition enacted by Congress.

Second, the Second Circuit erred in concluding that, as used in Sections 1962(a) and (b), "enterprise" refers solely to an entity in which funds can be invested or a property "interest" of some sort can be acquired. That conclusion ignores the fact that those sections also outlaw "us[ing]" racketeering funds in the "operation" of any enterprise, 18 U.S.C. 1962(a), as well as "maintain[ing]" an interest in "or control"

of an enterprise through racketeering, 18 U.S.C. 1962(b). An enterprise can be "operat[ed]" or "control[led]" within the meaning of Sections 1962(a) and (b) even if it is not an entity in which funds can be invested or a property interest acquired. The Second Circuit's construction of the term "enterprise" also ignores the holding of *Turkette*, since the illegitimate associations *Turkette* found to be statutory "enterprises" will rarely if ever be the type of entities in which formal investments can be made, or in which traditional property interests can be acquired. See *Russello* v. *United States*, 464 U.S. 16, 24 (1983). And it is inconsistent with the analysis in *Russello* v. *United States*, *supra*, which recognized that Congress used the broad term "interest," rather than a more restrictive term, "because [it] did not wish * * * to be limited by rigid and technical definitions drawn from other areas of the law." *Id.* at 21.

Third, even if the *Ivic* court were correct in concluding that Sections 1962(a) and (b) contemplate only enterprises in which funds can be invested or in which formal property interests can be acquired, it does not follow that entities that cannot violate those two sections must be removed entirely from the reach of other sections of the statute. The inapplicability of the full range of statutory provisions to an entity does not imply that the entity can *never* be a RICO "enterprise." See *United States* v. *Turkette*, 452 U.S. at 585 ("Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept.").[5]

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[5] *Ivic*'s gloss on the "enterprise" element, if widely followed, would severely contract the scope of RICO, eliminating from its reach government agencies, courts, non-profit organi-

Nor does the analytical foundation of *Ivic* square with the court's conclusion: It does not logically follow from *Ivic*'s premise—*i.e.*, that Sections 1962(a) and (b) contemplate only entities in which funds may be invested or in which an interest may be acquired—that the entities covered by Sections 1962(a) and (b) necessarily have the making of money as their *purpose*. Not-for-profit organizations are not inherently incapable of receiving racketeering proceeds, nor are they necessarily less susceptible to any of the other abuses RICO sought to prevent.

The insubstantiality of the textual basis proffered by *Ivic* (and endorsed by the court of appeals in this case) for any "economic motive" requirement is revealed by the fact that *Ivic*, the Second Circuit's cases following *Ivic*, and the court of appeals' opinion in this case all hold that the "enterprise" need not be shown to have an economic purpose after all—as long as the predicate acts are motivated by such a purpose. See *United States* v. *Bagaric*, 706 F.2d 42, 56-57 (2d Cir.) (enterprise composed of terrorists who sought Croatian independence, and who mur-

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zations, and other non-economic entities that the lower courts have consistently held to fall within the statutory definition. See, *e.g.*, *United States* v. *Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) (Illinois Department of Transportation); *United States* v. *Yonan*, 800 F.2d 164, 167-168 (7th Cir. 1986) (Cook County State's Attorney's Office), cert. denied, 479 U.S. 1055 (1987); *United States* v. *De Peri*, 778 F.2d 963, 974 (3d Cir. 1985) (Philadelphia Police Department), cert. denied, 475 U.S. 1110 (1986); *United States* v. *Ferguson*, 758 F.2d 843, 848-849 (2d Cir.) (Black Liberation Army), cert. denied, 474 U.S. 1032 (1985); *United States* v. *Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (office of Michigan District Court of the 18th District), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Clark*, 646 F.2d 1259, 1263 (8th Cir. 1981) (office of County Judge).

dered those who failed to comply with extortion letters designed to raise money for that cause), cert. denied, 464 U.S. 840 (1983); *United States* v. *Ivic*, 700 F.2d at 65; Pet. App. A31. That the requisite economic motive or purpose may be found in the racketeering acts, even when the enterprise is shown to have a primarily "political" purpose, belies any claim that the term "enterprise" incorporates the requirement adopted by the court of appeals.[6]

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[6] *Ivic* also relied on guidelines for RICO prosecutions issued by the Department of Justice in 1981, which the court believed were entitled to deference under administrative law principles. See 700 F.2d at 64. The guidelines on which *Ivic* relied were superseded in 1984 to provide, contrary to the court's position in *Ivic*, that an association-in-fact enterprise must be "directed toward an economic *or other identifiable goal.*" U.S. Attorneys' Manual § 9-110.360 (Mar. 9, 1984) (emphasis added). The current United States Attorneys' Manual omits even that restriction.

In our view, *Ivic* erred in relying on the Department of Justice's RICO guidelines to reach its conclusion. To begin with, it is open to question whether the Department's construction of a criminal statute is entitled to administrative deference. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment). In any event, when such deference is appropriate, an agency's interpretation of the law may be used only to clarify statutory ambiguities; deference does not come into play unless the statute in question is ambiguous. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987). In light of the breadth of RICO's language, there can be no claim that the statute is ambiguous with respect to the issue presented here. Finally, the United States Attorneys' Manual is not intended to incorporate the Department's view of what the law is, but merely to provide internal guidance on the exercise of prosecutorial discretion. Because of that focus, the Manual expressly notes that it is "not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." U.S. At-

2. The court of appeals also relied on the legislative history of RICO, which shows that a principal concern of RICO's drafters was "the infiltration of organized crime into legitimate business." Pet. App. A28. While the court of appeals conceded that Congress's concerns extended beyond the infiltration of legitimate businesses by organized crime, it appeared to place some weight on the fact that "political terrorist organizations do not generate funds that could allow them to infiltrate legitimate business," *id.* at A28-A29, as indicating that Congress's concerns "may not have" extended to the conduct "of political terrorists." *Id.* at A29.

The short answer to that assertion is that speculation about the probable reach of concerns expressed by legislative history cannot substitute for interpretation of the language actually enacted by Congress. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495-496 n.13 (1985). As this Court has repeatedly emphasized, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). See also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). Because the statutory language does not encompass the limitation supposed by the court of appeals, the failure of the legislative

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torneys' Manual § 1-1.100 (Oct. 1, 1988). See *United States* v. *Carson*, 969 F.2d 1480, 1495 n.8 (3d Cir. 1992); *United States* v. *Senibaldi*, 959 F.2d 1131, 1136 (1st Cir. 1992). The Department's decision, at some point in the past, not to invoke RICO in the case of non-economic enterprises thus does not suggest that the statute should be read to exclude such enterprises from its reach.

history specifically to advert to the application of RICO urged by petitioners cannot be used to create an exception not otherwise found in the statute.[7]

3. In addition to lacking a foundation in the statutory language or the legislative history, the "economic motive" requirement endorsed by the court of appeals poses serious definitional problems that bear little, if any, relation to the policies of RICO. Among those problems are the extent to which a financial purpose must be present before the court of appeals' "economic motive" requirement is satisfied, and whether the "economic motive" must have caused either the formation of the enterprise or the commission of one or more of the predicate crimes. A political organization engaging in a pattern of unlawful acts may do so principally for political reasons, but the acts may have some incidental economic benefits for the organization—such as increasing contribu-

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[7] The court of appeals' reliance on the references in the legislative history to the infiltration of organized crime into legitimate businesses recalls the argument that was raised, and rejected, in *United States* v. *Turkette, supra.* There, the Court held that RICO was not meant to be restricted to combatting the infiltration of organized crime into legitimate businesses, but was meant to reach "the activities of enterprises organized and existing for criminal purposes." 452 U.S. at 591. The legislative history of RICO thus does not suggest that the scope of RICO should be restricted in the manner suggested by the court of appeals. Indeed, to the extent the legislative history speaks to the issue at all, it undermines the conclusion reached by the court of appeals. We note, for example, that the original bill that ultimately evolved into Section 1962 referred to "business enterprise[s]," rather than "enterprises." S. 1623, 91st Cong., 1st Sess. § 2 (1969). When Congress "includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. at 23-24.

tions from members and supporters. See *United States* v. *Ellison*, 793 F.2d 942, 945, 950 (8th Cir.) (white supremacist group's arson was "intended to produce operating funds" and "bolster[ed] * * * members' morale and commitment to [the group]"), cert. denied, 479 U.S. 937 (1986). The court of appeals' analysis leaves entirely unclear how much economic benefit would be enough to convert "political" conduct falling outside RICO into "economic" conduct falling within the statute's reach.

Moreover, the inquiry required by the court of appeals conflicts with the longstanding principle that motive and purpose, while sometimes relevant evidence, are not generally elements of crimes. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 927-928 (3d ed. 1982). See also *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976); *United States* v. *Malinowski*, 472 F.2d 850, 855-856 (3d Cir.), cert. denied, 411 U.S. 970 (1973); *United States* v. *Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (Stevens, J.); *United States* v. *Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970). Whether acts of extortion are motivated by a long-term political purpose, or whether that purpose is being claimed in a given case as a conscious charade or subconscious pretense for more mundane criminal aims, is a difficult question to resolve, and it is irrelevant to the traditional concerns of the criminal law. It is also irrelevant to the policies of RICO, since the economic and societal effects of a pattern of extortion are identical irrespective of the motives of those involved.

After confronting those questions, the Second Circuit has disavowed any inquiry into "long-term pecuniary objectives which in some sense can be said to supersede accompanying political or religious ones."

United States v. *Bagaric*, 706 F.2d at 54-55. The Second Circuit, however, has continued to adhere to the vague formulation that "*some* financial purpose" is required by RICO. *United States* v. *Ferguson*, 758 F.2d at 853. As the court of appeals acknowledged in this case, Pet. App. A32-A33, that requirement conflicts with the Third Circuit's conclusion in *McMonagle*. See *McMonagle* v. *Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) (White, J., dissenting from the denial of certiorari). There is no indication that the conflict will lessen with time, or that further consideration by the lower courts will shed any new light on the issue. Accordingly, we believe review is warranted to reconcile the conflicting decisions of the Second, Third, Seventh, and Eighth Circuits, and to make clear that RICO imposes no "economic purpose" or "motive" requirement.

4. Respondents contend that their conduct is not "extortion" under the Hobbs Act, 18 U.S.C. 1951, because they did not obtain any property from petitioners, and that the Court should therefore deny certiorari. See Terry Br. in Opp. 14-24. It is by no means clear that respondents' grudging interpretation of the Hobbs Act is correct, see, *e.g.*, *United States* v. *Green*, 350 U.S. 415, 418-420 (1956), but in any event the Court need not consider that question because it is not fairly included within the question presented by petitioners—*i.e.*, whether RICO imposes an "economic motive" requirement.

It is especially appropriate to assume the correctness of the Seventh Circuit's ruling against respondents on the Hobbs Act issue because the case comes to this Court on the pleadings, and therefore respondents may prevail only if it is "beyond doubt" that petitioners "can prove no set of facts" entitling them

to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See also *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-250 (1989) (dismissal proper only "if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations' "). As the RICO Case Statement makes clear, petitioners have undertaken to prove, *inter alia*, that respondents and their co-conspirators committed the "extortion" in question through a pattern of other crimes, including arson—a separate predicate under RICO. See 18 U.S.C. 1961(1)(A). Indeed, there is no indication that the court of appeals would construe RICO differently in a case in which the government or a private plaintiff relies on murder, arson, or kidnapping as predicate crimes. Thus, irrespective of the legal validity of petitioners' extortion theory, if the court of appeals erred in its construction of RICO, it is most assuredly not "beyond doubt" that petitioners can prove no set of facts entitling them to relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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